STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Kelly, P.J. and Murphy and Neff, J.J.

NATIONAL WINE & SPIRITS, INC.
NWS MICHIGAN, INC., and
NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiff-Appellants,

v

STATE OF MICHIGAN,

Defendant-Appellee,

And

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

_____ /

Supreme Court No. 126121

Court of Appeals No. 243524

Circuit Court for the County of Ingham
No. 02-13-CZ

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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I. **In early 1997, the Michigan Legislature "privatized" the State's liquor (i.e., spirits) distribution system. The Michigan Liquor Control Commission appointed Authorized Distribution Agents who are compensated by the State to store and deliver liquor throughout the state. Section 205(3) of the Liquor Control Code, MCL 436.1205(3), prohibits an Authorized Distribution Agent who is already, or subsequently becomes, a wine wholesaler from selling a brand of wine in a particular territory where another wholesaler is already distributing that brand unless such marketing was occurring prior to September 24, 1996. The Legislature enacted Section 205(3) to preserve an orderly and stable wine distribution system in the State. Where such legislation was enacted pursuant to the Legislature's authority under the Michigan Constitution and the Twenty-first Amendment to the United States Constitution to structure Michigan's spirits and wine distribution system, and the regulation does not discriminate against out-of-State products, does the legislation violate the "Dormant" Commerce Clause?**

The Court of Appeals answered: "No"

The circuit court answered: "No"

Appellee State of Michigan answers: "No"

Appellants answer: "Yes"

II. **The Legislature enacted Section 205(3) of the Liquor Control Code, MCL 436.1205(3), to preserve an orderly and stable three-tier alcohol distribution system in the State and to minimize the ability of Authorized Distribution Agents, who are compensated by the State, to monopolize the wine distribution network. The prohibition against "dualing" has a legitimate purpose and rationally serves that purpose. Does this regulation violate the Equal Protection Clauses of the Michigan and United States Constitution?**

The Court of Appeals answered: "No"

The circuit court answered: "No"

Appellee State of Michigan answers: "No"

Appellants answer: "Yes"

COUNTER-STATEMENT OF FACTS

Background

Appellee, State of Michigan, through the Legislature and through the Liquor Control Commission, exercises complete control over alcoholic beverage traffic within the State. Const 1963, art 4, § 40. Section 201(2) of the Liquor Control Code provides that, "except as otherwise provided in this act, the Commission shall have the sole right, power, and duty to control the alcohol beverage traffic and traffic in other alcoholic liquor within this state including the manufacture, importation, possession, transportation and sale thereof."[1]

The Liquor Control Commission appointed Appellant, NWS Michigan, Inc., as an authorized distribution agent (ADA) pursuant to § 205[2] to store and deliver spirits for the State of Michigan on or about December 22, 1996. NWS Michigan, Inc., became a Michigan corporation on October 21, 1996. NWS Michigan, Inc., controls Appellant, National Wine & Spirits, L.L.C., a Michigan limited liability company, which became a licensed wine wholesaler in Michigan on or about November 12, 1999. NWS Michigan is a wholly owned subsidiary of Appellant, National Wine & Spirits, Inc., an Indiana company.

Section 205(3) of the Liquor Control Code provides:

> An authorized distribution agent shall not have a direct or indirect interest in a supplier of spirits or in a retailer. A supplier of spirits or a retailer shall not have a direct or indirect interest in an authorized distribution agent. An authorized distribution agent shall not hold title to spirits. After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that

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[1] MCL 436.1201(2)
[2] MCL 436.1205

> wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.[3]

The Code clearly and unambiguously prohibits an ADA, such as NWS Michigan, Inc., who indirectly becomes licensed as a wholesaler, such as National Wine & Spirits, L.L.C., from selling or distributing a brand of wine to retailers in a county or part of a county where that brand of wine is already being sold or distributed by another wholesaler unless that brand was being sold or distributed by the ADA/wholesaler on or before September 24, 1996. This situation is commonly referred to as a "dual" or "dualing" of wine distribution rights for a particular brand in a particular geographic area.

The "dualing" restrictions in § 205(3) were first enacted in 1996 PA 440 which took immediate effect on December 19, 1996.[4]

The proceedings below

In 2002, nearly six years after NWS Michigan became an ADA, appellants filed this action in Ingham County Circuit Court challenging the constitutionality of § 205(3). Appellants first argued below that § 205(3) is unconstitutional on its face because it denies them equal protection of the law under the Michigan and United States Constitutions by prohibiting an ADA/wholesaler from being appointed to represent a brand of wine in a specific territory where that brand is already represented by another wholesaler, unless the ADA/wholesaler was doing so prior to September 24, 1996. The circuit court denied appellants' motion for summary disposition on their equal protection claim, finding that the Legislature had a legitimate purpose in enacting § 205(3): the preservation of the structure of an orderly and stable wholesale wine

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[3] MCL 436.1205(3)

[4] Since its enactment, § 205(3) has been amended. It now allows an ADA/wholesaler to acquire distribution rights that existed in another wholesaler as of September 24, 1996 by "acquisition, purchase or merger."

distribution system that furthers the State's interests and policies. The court further determined that the classifications set forth in § 205(3) rationally serve that purpose. An order granting summary disposition to appellee on that claim was entered May 28, 2002.

Appellees then filed a joint motion for summary disposition against appellants' claim that § 205(3) violates the "Dormant" Commerce Clause of the United States Constitution. The circuit court granted appellees' motion on August 14, 2002. The court held that the statute's regulation of Michigan's wine distribution system implicates powers reserved to the States by the Twenty-first Amendment to the United States Constitution and that Section 205(3) does not violate the Commerce Clause. The circuit court held that Section 205(3) does not discriminate against interstate commerce or out-of-State entities on its face or in its application.

The Court of Appeals affirmed the trial court's decision on March 24, 2004. Appellants sought leave to appeal to this Court, which this Court granted on January 20, 2006, after oral argument on the application.

SUMMARY OF ARGUMENT

Plaintiff-appellants National Wine & Spirits, Inc., NWS Michigan, Inc., and National Wine & Spirits, L.L.C., ("appellants") are effectively asking this Court to sit as a *de facto* Legislature because appellants believe the Legislature should have found a "better" way to achieve an unquestionably legitimate goal. They claim that the Legislature's decision, as embodied in § 205(3), is unconstitutional under the "Dormant" Commerce Clause of the United States Constitution[5] and under the federal and State Equal Protection Clauses.[6] But this Court has consistently declined such invitations for the reasons stated in *Terrien v Zwit*:[7]

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: "The responsibility for drawing lines in a society as complex as ours–of identifying priorities, weighing the relevant considerations and choosing between competing alternatives–is the Legislature's, not the judiciary's." [Citations omitted.]

Although statutes are presumed to be constitutional,[8] appellants argue that § 205 lacks a legitimate or rational purpose because the Legislature could have achieved that purpose in a way that would have better suited appellants' business model. In their opinion, the Legislature should have chosen a different methodology of reaching its stated goals. Based on innuendo and suggestion, appellants ask this Court to second-guess the Legislature and to re-write a valid statute.

Appellants mischaracterize the U.S. Supreme Court's decision in *Granholm v Heald*.[9] That case dealt with a facially discriminatory statute that favored in-State *products* over out-of-State *products*. *Granholm* is relevant here because it re-affirmed a State's right to structure its alcoholic beverage distribution system free of Dormant Commerce Clause constraints where, as

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[5] US Const, art I, § 8, cl 3
[6] US Const, Am XIV, § 1, and Const 1963, art 1, § 2
[7] *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002)
[8] *Phillips v MIRAC, Inc.*, 470 Mich 415, 422; 685 NW2d 174 (2004)
[9] *Granholm v Heald*, 544 US 460; 125 S Ct 1885; 161 L Ed 2d 796 (2005)

here, there is no *product* discrimination. And *Granholm* re-affirmed that States can require that *all* alcoholic beverages pass through *licensed in-State* wholesalers.

Behind all the smoke and mirrors, including the new affidavit that was not part of the lower court record (Plaintiff-Appellants' Appendix, p 154a), lies the reality that § 205(3) is neutral on its face and as applied, and that appellants lack any actual evidence of discriminatory intent. The Legislature's precise method of achieving its goals is a policy choice, and as this Court has held:[10]

> " . . . [p]olicy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary. The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice."

The Court should also reject appellants' belated attempt to argue that § 601's[11] one-year residency requirement for a wholesaler's license has any application to this case for the following reasons:

a. The constitutionality of that statute (which has been in place since the repeal of Prohibition) was not challenged in the trial court.

b. That statute does not and, in fact, has not prohibited appellants from being licensed as a Michigan wine wholesaler – and that was admitted by appellants in their Complaint and at oral argument before this Court on the application.[12]

c. Appellants could have been licensed as a wine wholesaler prior to September 1996, but they were not, by their *own* choosing.

d. Appellants are treated just the same as *anyone* else (including Michigan residents) who was not a licensed wholesaler before September 1996, and who subsequently became ADAs and wine wholesalers.

e. *Granholm v Heald*, makes clear that States can require that a wholesaler be an in-State licensed wholesaler and removes any doubt as to the constitutionality of § 601, assuming *arguendo* that provision is even at issue.

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[10] *Devillers v ACIA*, 473 Mich 562, 588-589; 702 NW2d 539 (2005) (emphasis added).
[11] MCL 436.1601
[12] Transcript, p 7.

As a result of these undisputed facts, § 205(3) does not violate the Dormant Commerce Clause or equal protection principles. In fact, the anti-dualing limitations of § 205(3) work a greater hardship on wine wholesalers who were in business as of September 1996, and who choose to become ADAs, because those limitations require those wholesalers to give up potential dualing rights that they had as of that date and would still have if they were not also ADAs.

The Dormant Commerce Clause

As both lower courts recognized, this case does not present a Dormant Commerce Clause issue. Specifically, the trial court stated:

> Now, I understand the [appellants'] argument, that because they were not participating at the cut off date they became forever ineligible to be grandfathered, and that they are an out-of-state firm. I understand that argument, and certainly the statute appears to have that effect, but it [the statute] has that effect on any entity, any institution, any company that would have been in the same position as the [appellants]. It doesn't single out the [appellants] and it doesn't single out out-of-state companies.
>
> * * *
>
> The statute is facially neutral. The statute does not on its own terms discriminate in any way between out-of-state and in-state entities. [August 14, 2002, Trial Tr., pp 18-20.]

The Court of Appeals reached the same conclusion, holding that:[13]

> MCL 436.1205(3) does not discriminate against out-of-state economic interests. The statute is but one provision of a comprehensive system that regulates the flow of all liquor into and within the state. MCL 436.1205(3) applies to both out-of-state and in-state ADAs. [Appellants] assert that defendant inserted the date in the statute to discriminate against out-of-state ADA/wholesalers because it "knew" that before that date all ADA/wholesalers were in-state entities. But [appellants] present no evidence of the Legislature's intent, instead they rely on mere speculation.
>
> * * *
>
> As discussed above, the statute contains a legitimate grandfather clause. [Appellee] asserts the date in the statute had to be before the effective date because if it was not, ADAs and wholesalers would have had a window of time to

[13] Plaintiff-Appellants' Appendix, p 146a

acquire licenses and/or obtain dualing agreements necessary to gain the unfair advantage that the statute sought to prevent. The reason it allowed already dualing wholesalers to continue to dual after they became ADAs is that they had already entered dualing agreements and defendant did not wish to take this preexisting right away. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp v Governor of Maryland*, 437 US 117, 126; 98 S Ct 2207; 57 L Ed 91 (1978).

* * *

Our next determination is whether the statute regulates evenhandedly with only incidental effects on interstate commerce. We conclude that plaintiffs have failed to establish that the statute has even an incidental effect on interstate commerce, i.e., "the interstate flow of articles of commerce."

* * *

Thus, we discern no indication that the statute prohibits the flow of interstate goods, places an added cost on them or distinguishes between them in the market. The Commerce Clause "protects the interstate market, not particular interstate firm, from prohibitive or burdensome regulations." *Exxon, supra* at 217-218.

The fact that the statute prohibits plaintiffs from dualing does not implicate the Commerce Clause. Therefore, the circuit court did not err in granting defendant's motion for summary disposition of plaintiffs' Commerce Clause claim. (Emphasis added).

The Equal Protection Clause

Appellants' Equal Protection Clause argument is also without merit. "It is well-established that preserving an orderly and stable three-tier alcohol distribution system which allows some competition is a legitimate government interest." (Court of Appeals Opinion, p 5).[14] As both the circuit court and the Court of Appeals recognized, § 205(3) serves this interest by maintaining a *viable* three-tier distribution system for wine, a system that has been in place since the repeal of Prohibition, to serve the State's interest in ensuring tax collection, maintaining orderly markets, avoiding diversion of alcoholic beverage products, and avoiding sales to minors. This three-tier system has been recognized as "unquestionably legitimate" by the U.S.

[14] Plaintiff-Appellants' Appendix, p 150a

Supreme Court.[15] Section 205(3) is rationally related to that interest. It rationally accomplishes the State's goal of private distribution of state owned spirits in a manner that does not destroy the *structure* of the longstanding wine distribution system that has existed for over 70 years in Michigan.

Standard of Review

Appellee agrees with appellants that this Court will review this matter *de novo*.

[15] *Granholm,* 161 L Ed 2d at 819

ARGUMENT

I. Background to understanding the State's Distribution System and Statutory Scheme.

Appellant, National Wine & Spirits, is a very large multi-state distributor of wine and spirits. National Wine & Spirits could have become a wine wholesaler in Michigan before 1996, but it chose not to do so until 1999. Appellants have never objected to Michigan's wine wholesaler licensing residency requirement, and, in fact, applied for and were granted a wine wholesaler license via National Wine & Spirits, L.L.C.

NWS Michigan, Inc. became an ADA in 1996, knowing the limitations on ADAs and wholesalers in Michigan. Appellants admit they participated in the creation of the ADA system in Michigan.

Appellees submitted two affidavits that are part of the record in this case. The affidavit of Michael J. Lashbrook,[16] President of the Michigan Beer and Wine Wholesalers Association ("MB&WWA"), explains the background of the legislation at issue, how ADAs are paid by the State, and some of the goals behind § 205(3). The affidavit of Nicholas Pavona,[17] Vice President of Classic Wines, Ltd., discusses the effect on non-ADA wine wholesalers such as Classic Wines who invested years of effort to establish their businesses under Michigan's alcoholic beverage regulatory scheme.

If appellants prevail and § 205(3) is declared invalid, the long-established wine distribution structure would collapse and be dominated by a few ADAs/wholesalers – something the Legislature sought to avoid as a matter of public policy.

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[16] Plaintiff-Appellants' Appendix, p 52a
[17] Plaintiff-Appellants' Appendix, p 60a

A. Michigan's licensed three-tier alcohol distribution system.

The need for regulation of alcohol traffic is of such paramount interest that Const 1963, art 4, § 40, delegates to the Liquor Control Commission, through the Legislature, "complete control of the alcoholic beverage traffic within this state." The Twenty-first Amendment to the United States Constitution guarantees Michigan's right to control distribution and importation of alcoholic beverages within and into the state. The Amendment provides in section 2 that "[t]he transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[18]

Like many States, Michigan's Liquor Control Code establishes a licensed three-tier distribution system[19] for wine. Section 305 establishes the relationship between wine suppliers and wine wholesalers, and enunciates the state's long-standing policy to have a strong and viable three-tier distribution system for wine. Specifically, § 305 addresses that public policy and provides, in part:[20]

> Regulation in this area [i.e., distribution of wine] is considered necessary for the following reasons:
>
> (a) To maintain stability and healthy competition in the wine industry in this state.
>
> (b) To promote and maintain a sound, stable, and viable 3-tier distribution system of wine to the public.
>
> (c) To recognize the marketing distinctions between beer and wine.
>
> (d) To promote the public health, safety, and welfare.

Michigan's three-tier system dates back to shortly after the repeal of Prohibition.[21]

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[18] US Const, Am XXI, § 2

[19] The three tiers are supplier, wholesaler, and retailer.

[20] MCL 436.1305

[21] See, e.g., MCL 436.1201, and "Historical and Statutory Note."

Among other things, the distribution system prohibits an entity in one tier from having a direct or indirect interest in an entity in another tier. *Borman's, Inc v Liquor Control Comm'n*[22] (addressing "anti-tied house" provisions). Thus, in Michigan, the only persons who are authorized to distribute wines to retailers are persons licensed by the State. The same is true for beer. As discussed below, the distribution of spirits (hard liquor), in contrast, is controlled by the State (formerly through state employees and now through state "agents") and the State regulates the retail price for spirits.

B. Privatization of distribution of spirits.

In 1996 Michigan partially "privatized" the distribution of spirits. Prior to the 1996 legislation, the State itself, through the Liquor Control Commission, warehoused and distributed spirits using state employees. With the passage of SB 1171 in December of 1996, the State still "controls" distribution of all spirits sold in Michigan and sets the price at which spirits are sold. However, the new system created authorized distribution agents, or ADAs, who warehouse and distribute spirits as agents of the State.[23] ADAs perform the role of warehouser and distributor of spirits pursuant to various statutes, regulations, and orders of the Liquor Control Commission. The ADAs receive guaranteed payments from Michigan and the spirit suppliers (in amounts set by the state) for these warehousing and distribution functions. This guaranteed compensation from the State covers the ADAs' operating costs and profit.[24]

As SB 1171 went through the legislative process, the Legislature recognized that ADAs would be receiving funds in connection with performing functions that had previously been performed by the State, and that this State guaranteed compensation for acting as an ADA would

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[22] *Borman's, Inc v Liquor Control Comm'n,* 37 Mich App 738, 748; 195 NW2d 316 (1972), and *North Dakota* v *United States*, 495 US 423; 110 S Ct 1986; 109 L Ed 2d 420 (1990)

[23] Lashbrook Affidavit, giving the background of this legislation (Plaintiff-Appellants' Appendix, p 52a).

[24] Lashbrook Affidavit (Plaintiff-Appellants' Appendix, p 52a).

give ADAs a tremendous economic advantage and clout should they enter into wine wholesaling activities in direct competition with the non-ADA wine distribution network.

In contrast to the distribution of spirits, wine is distributed by private parties who do not receive guaranteed payments from the State. Under Michigan's longstanding statutory scheme, a wine supplier has the right to appoint two or more wine wholesalers to distribute the same brand of wine in a specific geographic territory.[25]

As initially introduced, the "privatization" legislation would have prohibited a supplier of wine from appointing more than one wine wholesaler for a brand in the same sales area. Both the Administration and Legislature apparently rejected this concept. On September 24, 1996, amendments to the bill were introduced that would have prevented ADAs from being wine wholesalers and wine wholesalers from being ADAs.

As the bill made its way through the legislative process, the Legislature rejected that proposed outright prohibition but still sought to secure the existing wine distribution system (with its advantage to suppliers, retailers and consumers of having numerous wine wholesalers competing against each other for their business) from the obvious unfair advantages that would be enjoyed by State-paid ADAs who are also wine wholesalers. As its solution, the Legislature decided to prohibit ADAs who were or would become wholesalers from representing a specific brand of wine in a specific geographic area where that brand was being distributed by another wine wholesaler, unless the ADA/wholesaler had been distributing that particular brand, in that particular geographic territory as of September 24, 1996.[26] The Legislature picked the September 24, 1996 date (which was *before* the effective date of the legislation) to foreclose

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[25] For a variety of reasons, this dualing of wine distribution rights is seldom done. (Lashbrook Affidavit, Plaintiff-Appellants' Appendix, p 52a).

[26] The dual representation of the same brand in the same territory is known in the trade as "dualing." (Lashbrook Affidavit, Plaintiff-Appellants' Appendix, p 52a).

existing wine wholesalers who were going to become ADAs, from locking in additional dual wine distribution rights in contemplation of becoming ADAs.

Before reaching its final version, the section that became MCL 436.1205(3) went through many legislative drafts. As a result, it is clear that the Legislature considered and then rejected keeping wholesalers and ADAs separate.[27] It can be presumed that the State was concerned about having adequate coverage for spirits distribution and about having viable options for the spirits suppliers who hired ADAs. This is why the Legislature decided to allow wholesalers (who were already familiar with distribution and warehousing of alcoholic beverages) to become ADAs. But, in allowing wholesalers to also become ADAs, the Legislature decided that *anyone* who became an ADA would be barred from utilizing that role to gain an economic advantage over non-ADA wholesalers.[28] The restriction also favors any new ADA or wine wholesaler by keeping spirits distributors as ADAs from acquiring new wine rights in existing dualed territories and thus freezing new entrants out of the market.

II. The Court of Appeals Correctly held that Section 205(3) of the Liquor Control Code does not violate the "Dormant" Commerce Clause of the United States Constitution.

US Const art I, § 8, authorizes Congress to regulate commerce among the States. The "Dormant" Commerce Clause prohibits State laws that unduly burden interstate commerce.[29] The test here is whether the statute treats "liquor produced out-of-State the same as its domestic equivalent."[30] Appellants alleged in Count II of their Complaint that § 205(3) of the Liquor Control Code violates the "Dormant" Commerce Clause of the United States Constitution. Both

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[27] As originally introduced, SB 1171 did not mention the word "wholesaler" in the ADA part of the bill. In the substitute (S-3) for SB 1171, the Legislature inserted a new subsection (4) stating: "Beginning September 24, 1996, the Commission shall not license an authorized distribution agent as a wholesaler. The Commission shall not appoint or certify a wholesaler as an authorized distribution agent."

[28] Lashbrook Affidavit, Plaintiff-Appellants' Appendix, 55a-58a

[29] *General Motors Corp v Tracy*, 519 US 278, 287; 117 S Ct 811; 136 L Ed 2d 761 (1997)

[30] *Granholm*, 161 L Ed 2d at 820

the circuit court and the Court of Appeals correctly rejected that argument. Appellants now make the same argument, but cannot overcome the fact that the statute at issue does not discriminate against interstate commerce. Without discrimination, there can be no valid Commerce Clause challenge. This is the fatal flaw in appellants' position.

Section 205(3) does not discriminate against in-State or out-of-State products. And Section 205(3) treats in-State and out-of-State entities alike. Indeed, appellants, two of whom are actually Michigan corporate entities and subsidiaries of National Wine & Spirits, Inc., by their own admission, have become an ADA and a wine wholesaler. Even assuming incorrectly that § 205(3) creates a minor detriment to interstate commerce, that would still not give rise to a successful Commerce Clause challenge. The Commerce Clause is not implicated by police power regulations that merely have an incidental effect on commerce by burdening but not prohibiting distribution of products.[31]

A. Appellants have access to the Michigan market and to Michigan customers.

Appellants' argument that Michigan discriminates against out-of-State entities is contradicted by the allegations in their complaint. Specifically, appellants' complaint alleges that:

1. National Wine & Spirits, Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

2. NWS Michigan, Inc. is a wholly-owned subsidiary of National Wine & Spirits, Inc.

3. NWS Michigan, Inc. became incorporated in Michigan on October 21, 1996, and became an Authorized Distribution Agent of spirits for the State of Michigan on or about December 22, 1996.

4. National Wine & Spirits, L.L.C., is also a wholly-owned subsidiary of National Wine & Spirits, Inc.

[31] *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970)

5. National Wine & Spirits, L.L.C., became incorporated in Michigan on December 21, 1998, and became a licensed wine wholesaler in the State of Michigan on or about November 12, 1999.

These allegations disclose a number of critical facts. First, only one appellant (National Wine & Spirits, Inc.) is a foreign corporation; the other appellants are a Michigan corporation and a Michigan limited liability company. Second, appellants have *not* been denied access to the market. In fact, National Wine & Spirits, Inc. through its subsidiary, NWS Michigan, Inc., is an ADA, and through its subsidiary, National Wine & Spirits, L.L.C., is a wine wholesaler. Third, appellant NWS Michigan, Inc. chose to become an ADA knowing that it, like anyone else who decides to become an ADA and then a wholesaler, would be restricted from being "dualed" as a wine wholesaler in certain specific geographic areas for certain specific brands where it was not distributing those brands in those areas prior to September 24, 1996. In other words, appellants have no restrictions placed on them beyond those that any other Michigan corporation entering the market as an ADA or wholesaler would face. And, by NWS's own admission back in 2002, as an ADA, it had already distributed 13 million cases of spirits in Michigan. (Plaintiffs' Complaint for Declaratory Judgment, ¶ 2). Thus, while Michigan has not granted appellants the cartel or monopoly they apparently desire, appellants have attained access to the Michigan market.

B. Section 205(3) does not discriminate on its face.

Appellants' complaint does not allege that § 205(3) discriminates on its face, but appellants now allege that § 205(3) does so discriminate. The statute, however, is facially neutral and does not give Michigan residents special privileges or non-Michigan residents special burdens. At bottom, appellants allege that § 205(3) in its operation treats out-of-State businesses differently than in-State businesses. That argument cannot withstand scrutiny because the only possible effect *is the result of the failure to become a wine wholesaler before September 24,*

1996, which is the same for Michigan and out-of-State residents. Appellants *could have* become wine wholesalers before September 24, 1996; they simply chose not to do so. They are in the same position as any Michigan resident who made that same choice.

Contrary to appellants' assertion, § 205(3) does not give special advantages to entities that were wholesalers on September 24, 1996, and that subsequently became ADAs. Rather, § 205(3) *takes away* distribution opportunities, by limiting the dualing rights of wholesalers who choose to become ADAs. That is, wine wholesalers who were in existence as of September 24, 1996, had the potential opportunity to be appointed as a "dual" *anywhere* in Michigan for *any* brands of wine. After September 24, 1996, any wholesaler in Michigan that become an ADA has limited rights to be appointed as a "dual" in only those specific geographic areas for specific brands where it was already distributing that brand as of September 24, 1996. Therefore, § 205(3) imposes *restrictions* (not privileges) on all wholesalers operating in Michigan as of September 24, 1996, if they choose to become ADAs.[32]

Since the statute restricted the existing rights of wholesalers at the time it was enacted, it does not provide a special advantage to in-State businesses over out-of-State businesses. Appellants' continuing argument that the statute is "protectionist" is simply wrong.

C. The Court of Appeals properly held that appellants had presented no evidence of discrimination.

Appellants failed to meet their burden of proving discrimination in this case.[33] They cannot show that the statute discriminates against out-of-State products in favor of in-State

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[32] Anyone who is currently a wine wholesaler, but *not* an ADA, can still attempt to convince a wine supplier to dual it against other wine suppliers. And, if appellants chose not to be an ADA, they could have the same right to be dualed anywhere in Michigan for any brand of wine. However, as long as appellants are wine wholesalers *and* an ADA, they face the same limitations as all other ADAs/wholesalers on their ability to be dualed.

[33] *Granholm*, 161 L Ed 2d at 820

products. In addition, the Court of Appeals found no evidence of any intent to discriminate against out-of-State entities:[34]

> Plaintiffs assert that defendant inserted the date in the statute to discriminate against out-of-state ADA/wholesalers because it "knew" that before that date all ADA/wholesalers were in-state entities. **But plaintiffs present no evidence of the Legislature's intent, instead they rely on mere speculation.** We agree with the trial court that plaintiffs confuse "what everyone knew" with "legislative intent." The trial court determined that plaintiffs were asking it to discern the Legislature's motivation in passing the law which is "beyond the power of this Court." **Furthermore, we agree that the trial court could not determine the Legislature's intent, but not because it was beyond its power, but rather because it was beyond its ability as plaintiffs only presented its conjectures about what "everybody knew" and what the Legislature's intent "must have been."**

Appellants continue to present innuendo as "fact" in their brief before this Court, but they now attach an affidavit that was never presented to the trial court or the Court of Appeals. Plaintiff-Appellants' Appendix, Supplemental Affidavit of Patrick Anderson, p 154a. This is an attempt by appellants to expand the record on appeal and then assert that the Court of Appeals erred when it held that appellants failed to present any evidence.

Principles limiting appellate review to the record made in the trial court are well-established in Michigan jurisprudence. For example, the Michigan Rules of Court provide in relevant part that "[i]n an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced."[35] A Court's review is limited to the record presented to the lower court. *Long v Chelsea Community Hospital.*[36] On review of an order on a motion for summary disposition, appellate courts "only consider what was properly presented to

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[34] Court of Appeals Opinion, pp 4-5 (emphasis added). (Plaintiff-Appellants' Appendix, p 146a).
[35] MCR 7.210(A)(1)
[36] *Long v Chelsea Community Hospital*, 219 Mich App 578, 588; 557 NW2d 157 (1996)

the trial court before its decision on the motion."[37] Finally, any attempt to expand the record on appeal is generally prohibited and a party's references to items outside the record are rejected.[38]

Moreover, on an appeal from motions for summary disposition, this Court even refuses to consider tardy affidavits submitted on a new Motion for Rehearing.[39] Accord, *Maiden v Rozwood.*[40] There this Court made clear that it would not consider what a non-movant raises on appeal for the first time.

This Court should not permit the subversion of the rules of appellate practice by these appellants and should categorically reject appellants' ploy to change the record at this appellate stage of the proceedings. Appellees prevailed below on a motion for summary disposition pursuant to MCR 2.116(C)(10). Appellants had the same opportunity as appellees to make a record in circuit court. They did, in fact, present the Court with the original Affidavit of Patrick Anderson. The circuit court was apparently not persuaded by the unsupported, conclusory statements contained in that Affidavit. It denied appellants' motion for summary disposition.

That Appellants would even attempt such a blatant tactic as producing a new affidavit at this appellate level is an acknowledgment that the Court of Appeals correctly recognized that the record presented no evidence of discrimination.[41]

D. Even assuming, incorrectly, that § 205(3) created some burden on appellants, it still does not violate the Commerce Clause under *Exxon Corp v Governor of Maryland*, because there is no burden on interstate commerce.

Assuming, incorrectly, that § 205(3) results in some indirect discrimination, it still does not violate the Commerce Clause because it has no impact on the interstate flow of goods or

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[37] *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003), citing *Sprague v Farmers Ins Exchange*, 251 Mich App 260, 265; 650 NW2d 374 (2002), and *Long v Chelsea Community Hospital*, 219 Mich App 578; 557 NW2d 157 (1996)
[38] *Amorello v Monsanto Corp,* 186 Mich App 324, 330; 463 NW2d 487 (1990)
[39] *Quinto v Cross and Peters* Co, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996)
[40] *Maiden v Rozwood,* 461 Mich 109, 126 n 9; 597 NW2d 817 (1999)
[41] A review of the new affidavit shows that it is nothing more than the legal conclusion of the affiant.

products. In *Exxon Corp v Governor of Maryland,*[42] a Maryland law prohibited a producer or refiner of petroleum products from operating a retail service station in the State. Since almost all petroleum products sold in Maryland were produced or refined out-of-State, the effect of the law was to foreclose out-of-State oil companies from owning service stations to the detriment of out-of-State companies and to the benefit of in-State local businesses:[43]

In upholding the statutory scheme and finding no Commerce Clause violation, the *Exxon* Court first recognized that "the Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners."[44] It went on to hold that:[45]

> **the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce . . .** While the refiners will no longer enjoy their same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. **The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.**

Moreover, the *Exxon* Court confirmed that indirect burdens on certain companies do not amount to Commerce Clause violation unless there is some burden on interstate commerce:[46]

> Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers' supply may switch from company-operated stations to independent dealers, but **interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.**

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[42] *Exxon Corp v Governor of Maryland*, 437 US 117, 119-120; 98 S Ct 2207; 57 L Ed 91 (1978)
[43] *Exxon,* 437 US at 124-125
[44] *Exxon,* 437 US at 125
[45] *Exxon,* 437 US at 126 (emphasis added).
[46] *Exxon,* 437 US at 127-128 (emphasis added). Accord *Minnesota v Clover Leaf Creamery Co.,* 449 US 456; 101 S Ct 715; 66 L Ed 2d 659 (1981) (Minnesota law prohibiting the sale of milk products in plastic to the benefit of Minnesota producers of paper containers upheld as merely a minor burden on interstate commerce).

> The crux of appellants' claim is that, regardless of whether the State has interfered with the movement of goods in interstate commerce, it has interfered "with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v Alexandria Scrap Corp*, 426 US 794, 806. Appellants then claim that the statute "will surely change the market structure by weakening the independent refiners . . . ." **We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.** See *Breard v Alexandria*, 341 US 622. As indicated by the Court in *Hughes*, **the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.**

No one has alleged that § 205(3) keeps any brands of wine or spirits from moving in interstate commerce, and indeed, no one could do so. Appellants merely complain that § 205(3) prevents them from getting everything they want (i.e., a near monopoly on distribution of spirits and wine in Michigan), but this is not a Commerce Clause violation. As *Exxon* held, the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations,"[47] and appellants' challenge fails for that reason.

E. The *Granholm* decision does not support appellants' position, but rather confirms that their attack on Michigan's distribution structure must fail.

Appellants cite *Granholm v Heald*,[48] as though it provides some help for their Dormant Commerce Clause challenge in this case. But unlike *Granholm*, this case does not involve disparate treatment of out-of-State products or out-of-State producers. Rather, it involves how Michigan structures its "unquestionably legitimate" alcoholic beverage distribution system. *Granholm* unequivocally held that States have the right to determine how to distribute alcoholic beverages, and may set up a three-tier licensed distribution system for alcoholic beverages, as Michigan does for wine. Importantly, the Court in *Granholm* held:[49]

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[47] *Exxon*, 437 US at 217-218

[48] *Granholm v Heald*, 544 US 460; 125 S Ct 1885; 161 LEd2d 796 (2005)

[49] *Granholm*, 161 L Ed 2d at 819 (emphasis added).

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. **This does not follow from our holding. "The Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."** ***Midcal, supra*****, at 110.** A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. **States may also assume direct control of liquor distribution through State-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate."** ***North Dakota v. United States*****, 495 U.S., at 432. See also *id.*, at 447 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent**. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

In light of this holding, there is nothing in *Granholm* that calls § 205(3) into question. To the contrary, *Granholm* makes clear that since no products are at issue, appellants' challenge to the structure of distribution is meritless.

The lower courts recognized that the challenged statute is facially neutral, does not discriminate against products, and does not treat in-State companies differently than out-of-State entities. National Wine & Spirits, Inc., is an out-of-State corporation that, through affiliated companies, became an ADA in 1996 and a wine wholesaler in 1999. National Wine & Spirits, Inc., could have become a wine wholesaler in 1970, 1985, or at any other time *prior* to 1996, just as it did in 1999 through another affiliated company. As the trial court noted August 14, 2002 Trial Tr., pp 18-20:

> Now, I understand the [appellants'] argument, that because they were not participating at the cut off date they became forever ineligible to be grandfathered, and that they are an out-of-state firm. I understand that argument, and certainly the statute appears to have that effect, but **it [the statute] has that effect on any entity, any institution, any company that would have been in the same position as the Plaintiff. It doesn't single out the Plaintiff and it doesn't single out out-of-state companies.**

* * *

The statute is facially neutral. The statute does not on its own terms discriminate in any way between out-of-state entities.

The Court of Appeals reached the same conclusion:[50]

> **MCL 436.1205(3) does not discriminate against out-of-state economic interests.** The statute is but one provision of a comprehensive system that regulates the flow of all Liquor into and within the state. MCL 436.1205(3) applies to both out-of-state and in-state ADA's. Plaintiffs assert that defendant inserted the date in the statute to discriminate against out-of-state ADA/wholesalers because it "knew" that before that date all ADA/wholesalers were in-state entities. But plaintiffs present no evidence of the Legislature's intent, instead they rely on mere speculation.
>
> * * *
>
> Our next determination is whether the statute regulates evenhandedly with only incidental effects an interstate commerce. We conclude that plaintiffs have failed to establish that the statute has even an incidental effect on interstate commerce, i.e., "the interstate flow of articles of commerce."
>
> * * *
>
> Thus, we discern no indication that the statute prohibits the flow of interstate goods, places an added cost on them or distinguishes between them in the market. The Commerce Clause "protects the interstate market, not a particular interstate firm, from prohibitive or burdensome regulations."

No product is at issue here. Instead, this case involves an out-of-State participant who has in fact been allowed to participate in the in-State distribution system. Appellants merely seek to free themselves from the *structural limitations* on being an ADA/wholesaler that apply equally to all other in-State participants in the distribution system. But, "**[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of State the same as its domestic equivalent.**"[51]

Instead of unburdening commerce, appellants seek the opportunity for a monopoly or near monopoly. According to their economic theory of "combined cost economies," were

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[50] Court of Appeals Opinion, p 6 (emphasis added) (Plaintiff-Appellants' Appendix, p 151a).
[51] *Granholm*, 161 L Ed 2d at 819 (emphasis added).

appellants to prevail, the likely result would be consolidation of wine and spirits distribution into 3 distributors instead of at least 37 wine wholesalers. Appellants and the other two ADA/wine wholesalers, through their role as State "agents," with guaranteed State reimbursement as ADAs, would gobble up the wine distribution market, leaving manufacturers and retailers at a disadvantage and forced to deal with a very limited number of wine distributors. This would lead to vertical integration with manufacturers[52] and limit brand development and distribution; exactly the result Michigan has an interest in preventing.[53] (Affidavit of Michael Lashbrook, Plaintiff-Appellants' Appendix, p 52a, and Affidavit of Nicholas Pavona, Plaintiffs-Appellants' Appendix, p 60a).

III. The one-year residency requirement for a wine wholesaler license is not at issue here, and that requirement does not create any commerce clause concerns.

The constitutionality of § 601[54] was not challenged in the trial court and, therefore, is not even an issue on appeal.[55] Even if this provision were at issue, the result here would not change. Appellant, National Wine & Spirits, L.L.C., never sought to become a Michigan wine wholesaler until 1998. Even then, it never challenged the residency requirement.

The one-year residency requirement for a wholesale license in § 601 in no way prevents anyone from being a wholesaler and, in fact, as noted, one of the appellants is a licensed wholesaler in Michigan.

The residency requirement for wine wholesalers dates back to the former Liquor Control Act, which took effect on December 15, 1933. Individuals who were involved in the sale and

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[52] With only three wine distributors, large wine manufacturers could dominate the wholesaler tier, making it difficult for smaller wine manufacturers to find aggressive wholesalers to market their products.

[53] *Traffic Jam & Snug, Inc v Liquor Control Commission,* 199 Mich App 640, 643; 487 NW2d 768 (1992)

[54] MCL 436.1601

[55] *Swickard v Wayne County Medical Examiner*, 438 Mich 536; 475 NW2d 304 (1991) (issues not decided by circuit court were not present for appeal).

distribution of alcoholic beverages during Prohibition were engaged in a criminal enterprise. After the repeal of Prohibition, the residency requirement gave the then just established Michigan Liquor Control Commission a regulatory mechanism to prevent criminals from obtaining a wine wholesaler license.[56] This regulatory requirement also assures that the Liquor Control Commission has prompt, certain, and *effective* jurisdiction over wholesalers.

Finally, in *Granholm,* the Supreme Court re-affirmed that States can require wholesalers to be residents:[57]

> The Twenty-First Amendment . . . empowers North Dakota to require that all liquor sold for use in the state be purchased from a licensed **in-state** wholesaler.

IV. Section 205(3) of the Liquor Control Code does not violate the Equal Protection Clauses of the Michigan and United States Constitutions. The Court of Appeals correctly held that Section 205(3) is rationally related to a legitimate State interest, so there is no equal protection violation.

Appellants continue to argue that the prohibition against dualing contained in § 205(3) of the Liquor Control Code denies them equal protection of the laws as guaranteed by the United States and Michigan Constitutions, US Const Am XIV; Const 1963, art 1, § 2. That argument was categorically rejected by the circuit court and Court of Appeals. The Court of Appeals correctly held at p 6 of its Opinion in this case:[58]

> We conclude that the classification based on date is rationally related to defendant's purpose. Before 1996, there were no ADAs because the distribution of alcohol was handled solely by Michigan's Liquor Control Commission. After defendant allowed ADAs to distribute alcohol, it realized that ADAs receiving state subsidies that were also wine wholesalers had an unfair economic advantage over wine wholesalers that were not ADAs. In order to prevent this specific unfair advantage, it decided to preclude ADA/wholesalers from dualing. But because some ADA/wholesalers already had dualing agreements, defendant did not take away their preexisting right to dual. It was necessary for the Legislature to insert a date prior to the date the statute was effective because if it had not

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[56] This long established regulatory requirement must be put in its historical context and came into existence before the availability of computers and other modern investigative tools.
[57] *Granholm*, 161 L Ed 2d at 820 (emphasis added). *North Dakota v United States*, 495 US 423, 447; 110 S Ct 1986; 109 L Ed 2d 420 (1990) (Scalia, J., concurring).
[58] Plaintiff-Appellants' Appendix, p 151a

> ADAs and wholesalers would have had a window of time in which to obtain licenses and/or dualing agreements. In other words, it would have allowed circumstances to be altered beyond the status quo.
>
> Plaintiffs argue that the statute did not include a legitimate grandfather clause because it gave "existing wine wholesalers an *additional benefit* that they never had before enjoyed, i.e., the right to be both a wine wholesaler *and* an ADA." We disagree. . . . The focus of the statute is on ADA/wholesalers dualing, not on allowing wholesalers to become ADAs or vice versa. Rather than penalizing a wine wholesaler that already had a dualing agreement when/if it became an ADA, the Legislature allowed the wine wholesaler to continue to operate under their preexisting agreement.

A. Analytical framework for Equal Protection.

The Equal Protection Clauses and jurisprudence of the United States Constitution and the Michigan Constitution are co-extensive.[59] *Harvey* involved an equal protection challenge to the Judge's Retirement Act. The Act allowed the State to provide a greater retirement allowance to 36th District Court Judges then it provides for Judges in all other judicial districts. This Court explained where the rational basis test applies:[60]

> Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. *Shavers v Attorney General,* 402 Mich 554, 613-614; 267 NW2d 72 (1978). Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. *O'Donnell v State Farm Mut Automobile Ins Co,* 404 Mich 524, 542; 273 NW2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers, supra.*

This Court then applied the rational basis test and found that:[61]

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[59] *Harvey v Michigan*, 469 Mich 1; 664 NW2d 767 (2003)
[60] *Harvey,* 469 Mich at 7
[61] *Harvey*, 469 Mich at 15

> The State, by assuming the entire funding of pensions of 36th District Judges in the financially distressed city of Detroit, made those pensions more secure. Certainly, the legislature would or could understand that this would induce competent and qualified attorneys to become judges or to remain judges . . . .

Similarly, in this case, the Legislature made a rational policy decision that enacting the restrictions on dualing in § 205(3) would enable non-ADA/wine wholesalers to compete with newly created state-subsidized ADAs who were also wine wholesalers. The Legislature wanted to preserve an orderly and stable wholesale tier in the State's wine distribution system. The Legislature made a legitimate policy choice. As the Court of Appeals correctly held, that choice does not violate appellants' right to equal protection of the law.

Appellants continue to insist that the Legislature's use of September 24, 1996, as the dualing cut-off date in § 205(3), effectively shut them out of the wholesale wine market in Michigan. Appellants had not, as of that date, chosen to apply for a wholesaler's license. They did, in fact, apply for such a license in 1998 and obtained it in 1999. Even though Appellants chose not to apply for a wholesaler's license prior to September 24, 1996, they continue to argue that the Legislature's use of that date denies them equal protection of the law because they did not have a wholesaler's license at the time the statute was enacted, and thus don't have the same dualing rights as the other two major ADA/wine wholesalers.

Michigan courts have addressed the issue of whether the effective date of a statutory regulation violates Equal Protection. In *Park v Lansing School Dist*,[62] the Court addressed a Lansing School District policy adopted in 1969 that required administrators to live within the district or suffer loss of their administrative positions. The policy contained an exception for those who had held administrative positions since July 1, 1962. The policy was adopted in 1969, but the July 1, 1962 date was the date when the policy was first brought up in Board discussions. The Court found the grandfather clause did *not* violate Equal Protection:

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[62] *Park v Lansing School Dist*, 62 Mich App 397; 233 NW2d 592 (1975)

> Those hired after July, 1962 knew what was expected of them in terms of residence. The allowance made for a certain few administrators can be explained as coming from a desire to accommodate the interests of those administrators who had established themselves outside the district before the policy of in-district administrators was brought up . . . [Those challenging the selection of this date] must show that the rule extends a privilege to 'an arbitrary or unreasonable class', *Alexander v Detroit*, 392 Mich 30, 36; 219 NW2d 41 (1974), and that there is no conceivable set of facts that can justify the distinction made in the rule. *Forman v Oakland Co Treasurer*, 57 Mich App 231; 226 NW2d 67 (1974). This has not been done. We are unwilling to say that the rule's cutoff date is wholly without supporting reason.

The distribution of liquor is highly regulated by the State pursuant to the authority of Mich Const 1963 art 4, § 40, so finding a violation of the rational basis test is even more difficult in this context. Indeed, even appellants concede that the three-tier system created by the Legislature for distribution of alcoholic beverages is "designed to protect orderly markets and promote temperance." As noted in the affidavits the State submitted to the trial court, Section 205(3) is rationally related to Michigan's interest in maintaining a viable, strong three-tier distribution system for wine. The Legislature long ago concluded this was in the best interest of Michigan and the public. This statement of public policy is explicitly set forth at § 305 of the Liquor Control Code which provides in pertinent part:[63]

> Sec. 305. (1) The purpose of this section is to provide a structure for the business relations between a wholesaler of wine and a supplier of wine. Regulation in this area is considered necessary for the following reasons:
> **(a) To maintain stability and healthy competition in the wine industry in this state.**
> **(b) To promote and maintain a sound, stable, and viable 3-tier distribution system of wine to the public.**
>
> * * *
>
> (d) To promote the **public** health, safety and **welfare**.

Before the passage of § 205(3), suppliers had the right to "dual" *any* wine wholesaler anywhere in Michigan. That is, at the discretion of suppliers, more than one wine wholesaler in

[63] MCL 436.1305 (emphasis added.)

the same geographic territory could be appointed to distribute the same brands of wine.[64] However, after § 205(3), wine wholesalers who chose to become ADAs were prohibited from being dualed in any area of the State where they were not already distributing a particular brand on or before September 24, 1996. Therefore, wine wholesalers who chose to become ADAs, just like ADAs who become wine wholesalers, have restrictions placed on their ability to be appointed on a "dualed" basis.

Section 205(3)'s restrictions do not, however, prevent an ADA/wholesaler from competing with new brands or from buying an existing wholesaler and distributing its products even on a dualed basis where the purchased wholesaler was already distributing a brand in a particular territory on September 24, 1996. The Legislature rationally chose as part of the privatization scheme to maintain the "status quo" as it existed just prior to the passage of the privatization act, and allowed wholesalers who were already dualed to be "grandfathered in" with regard to those *specific geographic territories* for those *specific brands*. But all wholesalers who became ADAs lost their right to be "dualed" with other wine wholesalers in any other part of the State where they were not already distributing a then-existing wine brand as of September 24, 1996, the date that was inserted into the statute while it was undergoing the legislative process.

The Legislature decided to utilize the September 24, 1996 date for a very practical reason: if that date had not been inserted into the statute, there would have been nothing to stop wine wholesalers who believed that they were going to be appointed as ADAs from going to

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[64] As a practical matter, prior to 1996, and currently, many wine suppliers do not, in fact, want to appoint more than one wine wholesaler in a geographic territory, and dual appointment of wine wholesalers is not currently the norm. Lashbrook Aff., ¶ 7. However, ADAs/wholesalers might be able to persuade suppliers to appoint them as "duals" because of their use of State subsidies to deliver wine and spirits from the same truck and their State-wide distribution rights as ADAs. This would disrupt the long-established marketing scheme to the detriment of the state, suppliers, consumers, and retailers, and especially small retailers.

suppliers and obtaining "duals" prior to the effective date of the statute.[65] In *Park v Lansing School Dist,* the Court recognized another reason why a date may be inserted into a statute other than the effective date of the statute and not violate Equal Protection.[66] That is, choice of that date was needed to achieve the practical goal of the legislation. The Court of Appeals came to the same conclusion in this case.

Contrary to the argument made by Appellants, the inclusion of the September 24, 1996 date in the statute worked more of a hardship on then-existing wine wholesalers who were going to become ADAs because they were forced to give up a right they previously had to be appointed on a "dualed" basis.[67] By choosing the date selected, the Legislature wanted to recognize existing distribution rights but to restrict future expansion of distribution rights via "dualing" for any existing wholesaler who might try to become an ADA.

Appellants incorrectly assert that they are "effectively" kept out of the wine wholesaler market. To begin with, § 205(3) prohibitions only apply to *particular* limited geographic areas and *particular* brands that were being distributed in those areas on or before September 24, 1996. That restriction does not apply to any brands of wine that were not being distributed at that point in time. And, the record indicates that new wine brands are continually being offered in Michigan. Affidavit of Julie Wendt, Director of Licensing for the Michigan Liquor Control Commission, Exhibit F, attached to State of Michigan's Brief in Opposition to Application for Leave to Appeal. She notes that there are 20,000 brands of wine registered in Michigan for resale in the State of Michigan, and of the 300 licensed out-State sellers of wine, approximately 143 licenses have been issued since September 24, 1996. This clearly demonstrates that new

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[65] Lashbrook Affidavit, Plaintiff-Appellants' Appendix, p 58a, ¶ 26

[66] *Park*, 62 Mich App at 398

[67] It is difficult to understand how appellants could claim harm from selection of this date since NWS did not become a wholesaler until 1999.

wine suppliers and wine brands are continually coming into the market. Likewise, nothing would prohibit appellants from purchasing existing wine wholesalers.

The dualing restrictions placed on appellants is the same limitation placed on everyone else and does not give rise to an equal protection violation since the State's actions are rationally related to its interest in maintaining a strong, viable wine distribution system with a number of wholesalers to ensure competition and service to all retailers (large and small) and the public.[68]

The Court of Appeals correctly decided that appellants' equal protection challenge was meritless because appellants have no evidence to substantiate their assertions. Appellants fail to significantly challenge the Court of Appeal's decision, but simply ignore it and reach their own conclusions about the interests and purposes behind § 205(3). But, as already noted above, appellants failed to provide *any evidence* and merely rely on speculation.

V. Appellants' Argument regarding Section 205(3)'s status as a "Grandfather Clause" is incomprehensible, irrelevant, and devoid of supporting authority.

Finally, appellants argue, without any supporting authority or explanation of its significance, that § 205(3) is not a "grandfather clause" because it does not place new restrictions on existing wine wholesalers. Notwithstanding the fact that the statute clearly does do so if an existing wine wholesaler becomes an ADA, and *becoming an ADA is the subject-matter of the statute*, appellants fail to offer the significance of this point. They do not assert that a grandfather clause is *per se* valid or invalid, and do not offer a definition of the term at all. In sum, appellants offer no reason or argument why calling § 205(3) a "grandfather clause" or not doing so matters at all.

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[68] Lashbrook Aff., ¶ 24, Plaintiffs-Appellants' Appendix, p 52a, which was unopposed and which points out that if there are not a number of wine wholesalers available in a market, an ADA/wholesaler can "cherry pick" the most lucrative retail outlets (e.g., large retail chains) and ignore the smaller retailers to the detriment of the retailers and consumers.

"Failure to properly brief an issue on appeal constitutes abandonment of the question."[69] Appellants cannot "simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."[70] "A mere statement of position is insufficient to bring an issue before this Court."[71]

Appellants have, therefore, effectively abandoned this argument, and even if they had not done so, the argument is insignificant. No one has asserted that calling § 205(3) a "grandfather clause" forecloses appellants' challenges in this case, so appellants' argument is meaningless. This Court should reject it as such.

[69] *Gross v General Motors Corp*, 448 Mich 147, 162 n 8; 528 NW2d 707 (1995)
[70] *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959)
[71] *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992)

CONCLUSION

Section 205(3) does not violate the "Dormant" Commerce Clause of the United States Constitution as it does not discriminate against out-of-State products in favor of in-State products. Further, it treats in-State and out-of-State companies alike. It does not discriminate on its face or as applied to appellants. Appellants are currently both a wine wholesaler and an ADA. Most importantly, even if there were some incidental effect here on interstate commerce (there is not), the Michigan Legislature would still have the right to structure the State's wholesale wine distribution system as it has pursuant to the authority granted to Michigan (and other States) by the Twenty-first Amendment to the United States Constitution. The United States Supreme Court recently reaffirmed the right of the States under the Twenty-first Amendment to exercise "virtually complete control" over how to structure their alcohol distribution systems in *Granholm v Heald.*[72]

Section 205(3) of the Liquor Control Code does not violate the Equal Protection Clauses of the Michigan and United States Constitutions. The Legislature had a legitimate purpose in enacting this provision to protect the State's interest in the preservation of an orderly and stable wine distribution system. Section 205(3) is rationally related to the State's goal of privatizing the distribution of spirits, without destroying the three-tier distribution system for wine. The statutory classifications rationally serve that purpose. Section 205(3) represents a legitimate legislative policy choice to preserve an effective wine distribution system consistent with the regulatory scheme that has been in place since the repeal of Prohibition. That system has served the State and its citizens well since that date.

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[72] *Granholm*, 161 L Ed 2d at 819

Finally, this Court's recent decision in *Devillers v ACIA*,[73] explains precisely why it should affirm the Court of Appeals in this case. This Court recognized that "policy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary. The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice."

Respectfully submitted,

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Date: April 24, 2006

[73] *Devillers v ACIA*, 473 Mich 562, 588-589; 702 NW2d 539 (2005)

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Kelly, P.J. and Murphy and Neff, J.J.

NATIONAL WINE & SPIRITS, INC.
NWS MICHIGAN, INC., and
NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiff-Appellants,

v

STATE OF MICHIGAN,

Defendant-Appellee,

And

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

Supreme Court No. 126121

Court of Appeals No. 243524

Circuit Court for the County of Ingham
No. 02-13-CZ

_____ /

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Debra Carpenter, being first duly sworn, deposes and says that on April 24, 2006, she personally mailed two (2) copies of:

DEFENDANT-APPELLEE'S STATE OF MICHIGAN'S BRIEF ON APPEAL and this *PROOF OF SERVICE*

by placing same in envelopes addressed to:

Louis B. Reinwasser, Esq.
MILLER, CANFIELD, PADDOCK AND STONE, PLC
One Michigan Avenue, Suite 900
Lansing, MI 48933-1609

Morton Siegel, Esq.
SIEGEL MOSES & SCHOENSTADT, PC
444 N. Michigan Ave., Ste. 2600
Chicago, IL 60611

Anthony S. Kogut, Esq.
WILLINGHAM & COTE, P.C.
333 Albert Avenue, Suite 500
East Lansing, MI 48823-4394

Sealing said envelopes, affixing the necessary postage for first class mail thereto and placing said envelopes in the United States mail at Farmington, Michigan.

Debra Carpenter

SUBSCRIBED AND SWORN to before
me this 24th day of April, 2006

Sharon S. Simmons

Sharon S. Simmons, Notary Public
Livingston County, MI
*Acting in Oakland County, MI
My Commission Expires: 9/13/10